

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Montauk Sand & Gravel Corp. :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation :
Franchise Tax under Article 9A of the Tax Law for :
the Period 7/31/79. :
:

AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 29th day of May, 1985, he served the within notice of Decision by certified mail upon Montauk Sand & Gravel Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Montauk Sand & Gravel Corp.
26 Laurel Dr.
Smithtown, NY 11787

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
29th day of May, 1985.

David Parchuck

James A. Haglund

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

May 29, 1985

Montauk Sand & Gravel Corp.
26 Laurel Dr.
Smithtown, NY 11787

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Lawrence J. Mittenthal
525 Northern Blvd.
Great Neck, NY 11021
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
MONTAUK SAND & GRAVEL CORP.	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Corporation Franchise Tax under	:	
Article 9-A of the Tax Law for the Period	:	
July 31, 1979.	:	

Petitioner, Montauk Sand & Gravel Corp. 26 Laurel Drive, Smithtown, New York 11787, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the period July 31, 1979 (File No. 43599).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 1, 1984 at 1:30 P.M. Petitioner appeared by Lawrence J. Mittenthal, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether petitioner was entitled to investment tax credit carryforwards on transportation equipment used in the production of goods by extraction, which equipment was licensed for over-the-road use.

FINDINGS OF FACT

1. Petitioner, Montauk Sand & Gravel Corp., is a corporation engaged in the extraction and sale of sand and gravel. The sand and gravel are extracted from pits owned by parties unrelated to petitioner.

2. Petitioner filed a State of New York Corporation Franchise Tax Report for the fiscal year ended July 31, 1979. On this report, petitioner claimed an investment tax credit carryforward of \$1,481.72. The equipment on which the claimed investment tax credit was based consisted of: two 1974 Mack chassis and two 1974 Summit dump bodies acquired on October 16, 1973; a 1967 payloader acquired on September 17, 1976; and a 1978 Mack tractor acquired on March 27, 1978.

3. On December 17, 1982, the Audit Division issued a Notice of Deficiency to petitioner asserting a deficiency of corporation franchise tax in the amount of \$1,481.70, plus interest of \$597.21, for a total amount due of \$2,078.91.

4. The Statement of Audit Adjustment, which accompanied the Notice of Deficiency, explained that the adjustment was based upon the investment tax credit carryforward from the periods ended July 31, 1974 through July 31, 1978 to the period in issue in the amount of \$2,625.06. The Statement of Audit Adjustment further explained that the transportation equipment upon which the investment tax credit was claimed did not qualify for the credit since the equipment was not used directly in the extraction of sand and gravel, but only in the transportation thereof. The Audit Division also noted that the transportation equipment was registered for use on the public roads.

5. The Mack chassis and dump bodies are used together to transport materials. The Mack tractor is also used to transport materials. The payloader is a mobile piece of equipment which petitioner uses to scoop sand and gravel.

6. In its operation of a gravel pit, petitioner would use the payloader to scoop out a mound of sand and gravel and place it into the back of a truck. The truck would then transport the sand and gravel to a screening plant. The sand and gravel would be transferred from the truck to the top of the screening

plant through the use of a conveyor belt. The screening plant contained a shaker which vibrated, thereby separating the sand from the gravel. When material accumulated underneath the screening plant, the payloader and Mack tractor would be used to stockpile the material in a different location.

7. It was petitioner's practice to use the Mack tractor in a gravel pit from about 7:00 a.m. to 3:30 p.m. five days a week. In the evening, the tractor was used to haul one or two loads of sand from the gravel pit to New York City. If one load of sand was delivered to New York City, the tractor would leave at 4:00 p.m. and return to the gravel pit at approximately 6:30 p.m. If two round trips were made in a certain evening, the tractor would leave at the same time but return to the gravel pit at 8:30 or 9:00 p.m. The Mack chassis and dump bodies were licensed and used on the public roads about ten percent of the time.

8. An alternative to using trucks would have been to use a conveyor belt to transport the sand and gravel from the pit to the screening plant. Petitioner did not use a conveyor belt in this manner because it was more costly than using trucks.

CONCLUSIONS OF LAW

A. That during the period in issue, section 210.12(b) of the Tax Law provided, in part:

"A credit shall be allowed under this section with respect to tangible personal property and other tangible property, including buildings and structural components of buildings, which are: depreciable pursuant to section one hundred sixty-seven of the internal revenue code, have a useful life of four years or more, are acquired by purchase as defined in section one hundred seventy-nine (d) of the internal revenue code, have a situs in this state and are principally used by the taxpayer in the production of goods by...extracting."

B. That in view of Finding of Fact "6", supra, it is clear that the equipment in question was involved in the production of goods (that is, sand

and gravel) by extraction within the meaning of section 210.12(b) of the Tax Law. (It is noted that 20 NYCRR 5.2-4(b) is not applicable to the facts presented herein [see Matter of L-Brooke Farms, Inc., State Tax Commission, December 31, 1984].)

C. That 20 NYCRR 5-2.4(c) defines the term "principally used" within the meaning of section 210.12(b) of the Tax Law as more than fifty percent. That petitioner has established that all of the equipment in issue was used more than fifty percent of the time in the production of goods by extraction. Accordingly, the equipment in issue was "principally used" in the production of goods within the meaning of section 210.12(b) of the Tax Law and 20 NYCRR 5-2.4(c).

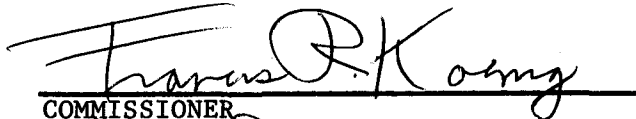
D. That the petition of Montauk Sand & Gravel Corp. is granted and the Notice of Deficiency, issued December 17, 1982, is cancelled.

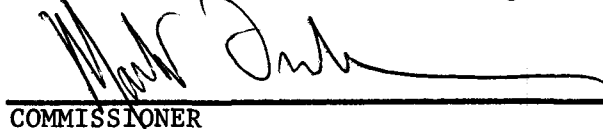
DATED: Albany, New York

STATE TAX COMMISSION

MAY 29 1985


PRESIDENT


COMMISSIONER


COMMISSIONER